STITUTION, 1310. See also 4 Elliott, Deb. 176, 177. *Cf. Re Opinion of the Justices,* 107 Atl. 705, *supra.*

The Oregon constitution providing for referring to a vote of the people "any act of the Legislative Assembly" is fairly typical of state referendum provisions. In Michigan it is declared that "Any bill passed by the legislature approved by the governor, except appropriation bills, may be referred," etc. The Nevada constitution provides for reference of any law *or resolution.* It is common knowledge that ratification of proposed amendments is by joint resolution, not by act or bill. In the Oregon case the court concluded that this was sufficient to make the referendum provision inapplicable. On the other hand, the Washington court dealing with a referendum provision essentially the same, held the referendum properly made use of.

That a joint resolution is not an act or a bill in the normal sense of the words must have been known to the makers of the various constitutions. See WILLARD, LEGISLATIVE HANDBOOK, Chap. 5. However, such situations would not seem appropriate for strict, technical constructions, and if *law* is made by a joint resolution it would seem a not unreasonable contention that the referendum provision should apply. Such was the view of the Supreme Court of California in *Hopping* v. *City of Richmond,* 170 Cal. 605. Where a joint resolution is used, as it often is, as an administrative measure of course there should be no reference unless such acts of the legislative body are clearly included. Even under the liberal view of the California case it would seem that the referendum would be inapplicable to votes on these proposed amendments, the action of the legislature not being properly legislative. See *Ellingham* v. *Dye, supra.*

Indeed it might reasonably be doubted as to whether the question of effective ratification of proposed amendments, the counting of the votes by the states, is really a judicial question. The section quaranteeing a republican form of government is a familiar instance of a constitutional provision held not to raise a problem for the *courts. Pacific Telephone Co.* v. *Oregon Supra.*

R. W. A.

PRESUMPTIONS—BURDEN OF PROOF.—The case of *Gillett* v. *Michigan United Traction Co.* (Michigan, April 3rd, 1919), 171 N. W. 536, arose out of the following facts: Plaintiff, driving a Ford car with the curtains down, turned from the curb at the side of the street where he had stopped, to cross the interurban car tracks which ran through the center of the street in the city of Marshall, and as he drove his machine upon the track was struck by an interurban car and seriously injured. The evidence established beyond question, negligence of the defendant, by showing that the car was, at the time, exceeding the lawful rate of speed. The only question of fact in dispute was whether plaintiff was negligent in such manner as to have contributed to his injury. The case was taken from the jury upon the ground that the plaintiff had failed to discharge his burden of proving himself free from such negligence. In view of the case as presented to the supreme court its affirmation was required. There are one or two paragraphs of the affirming

opinion, however, which though in a sense *obiter*, may be considered worthy of note.

The theory upon which the case was taken from the jury was, that it was the duty of the plaintiff before driving upon the track, to have looked and listened for an approaching car. That had he done so he would have seen or heard the car which struck him, and to attempt to cross with that knowledge would be negligence, and if he failed so to look and listen he was negligent as matter of law, and in either case his action must fail.

The court's discussion is concerned mainly with the presumption of due care. One interesting phase of the opinion deals with the effect of the presumption of law upon the course of the trial. We recognize that there are two classes of such presumptions; the conclusive, permitting no attempt to show the non-existence of the fact presumed, and that which is disputable, requiring the finding of the fact presumed, in the absence of evidence tending to show that it does not exist, but permitting the introduction of such evidence to show that in the particular case, in spite of the presumption, it does not exist. That phase of the court's opinion here particularly referred to, is that which assumes, for the purposes of the court's discussion, that a rebuttable presumption of due care on the part of the plaintiff does obtain in certain cases until evidence tending to show its absence is given. In one paragraph the court says: "If uninfluenced by the presumption the jury reaches the conclusion that the evidence tending to show plaintiff's negligence, is not entitled to credit and should be disregarded, the presumption may then be considered as remaining in force so far as may be necessary to establish the fact that the deceased, (plaintiff), exercised proper care in all respects not expressly established by the evidence." In other words, though the evidence does "expressly establish" that plaintiff did not in certain respects exercise proper care, yet the presumption of due care is still operating in the case as to other phases of the question of due care, than such as are so "expressly established" by the evidence.

This question would, on first impression, seem to be purely academic, since if there is want of due care in the plaintiff in any respect which contributes to his injury, he must fail in his action, regardless of the degree of care he may have exercised in all other respects. The use made of it in the discussion of the court is to point out that if the evidence which goes to the jury tending to show want of due care in some definite particular, should still leave the jury ready to find due care in that specific feature of the transaction, that in such event the presumption would still operate requiring the conclusion of due care in all other respects than that to which the evidence introduced was relevant.

To illustrate: if a witness were to testify that the plaintiff did not "look," but no witness was able to testify that he "listened," that the court would be justified in instructing the jury that if, after considering all the evidence bearing upon whether he did look, they should be satisfied that the preponderance of the evidence was in favor of the contention that he did, then the presumption that he "listened" would still operate and require the finding that he did listen. This view necessitates the conclusion that the introduc-

tion of evidence in opposition to the presumption of due care of such probative value as must carry it to the jury, does not necessarily eliminate the general presumption of due care in accordance with the rule as we find it generally expressed, but only has the effect of eliminating the presumption in so far as that phase of due care is concerned to which the evidence is directly relevant.

Presumptions of law exist for the convenience of making proofs and so expediting trials, and are founded in the common experience of men with certain specific facts or conditions. Such experience has shown that certain facts and conditions are so related as that they are generally found to be co-existent. Rules of law applicable to such cases have come into existence requiring that where certain of the facts or conditions so related are found to exist, the other or others of such facts or conditions shall be found to exist--either with or without the opportunity, in the party against whom the rule operates, to show that such other facts or conditions do not exist in the particular case, dependent upon the uniformity of experience with such relations of facts or conditions.

Where the presumption of due care obtains it is grounded in the theory, that in the presence of known danger men usually are careful to avoid it, but that since, nevertheless many do not, the presumption is not conclusive but rebuttable. In this case the plaintiff knew of the railway track and that to cross it involved a serious measure of danger. These facts being proved, a recognition of the presumption in this case requires the conclusion that plaintiff exercised due care, but permits evidence in opposition to that conclusion.

The general rule that the presumption disappears with the introduction of evidence in opposition to the conclusion it requires, if sufficient to go to the jury, is recognized by the court in its opinion and needs no citation of authority to support it. The case is novel however, so far as the writer has been able to discover, in holding that evidence of sufficient probative value to carry to the jury the question of whether the plaintiff was negligent in some particular, does not open the whole question of due care to be determined upon the evidence presented, the presumption disappearing entirely.

Is not the presumption one, not that he "looked" and that he "listened" or that he did any other particular thing essential to due care, but that he did all things essential to that due care? If this be true should it not be concluded that one having the burden of proving due care, against whom there is introduced evidence tending to show him negligent in a material element of his conduct should be required to establish due care by his evidence unassisted by the presumption? Any evidence, worthy of consideration by the jury, in opposition to the conclusion required by the presumption, if introduced by the plaintiff, would defeat the presumption of due care under the general rule. The presumption, by giving a probative value to facts which they would not have except for the rule, is an exceptional method of proof and ought not to be extended to allow proof by it of any other than the fact to be presumed, that of due care, and when the conclusion of due care is

impeached by evidence of such substance as to present a real question for the jury, the presumption disappears.

Again in this case the court makes an unfortunate use of the term "burden of proof". As already indicated, the plaintiff insisted that because there was no witness who was able to testify that he did not "look" and "listen", that it was to be presumed that he did both, even though there may have been evidence that he was negligent in other respects, sufficient to take the question of due care to the jury. The court in discussing this claim of plaintiff says: "There is no reason why an unsuccessful attempt to show the negligence of plaintiff in some particular respect, should place upon him the burden of proving by affirmative evidence that he used due care in all respects —a burden which did not rest upon him before the attempt was made."

The criticism of this statement is, that that particular burden, that of proving "that he used due care in all respects", is just the burden which plaintiff, under the rule in Michigan, does take upon himself when he brings his action and it does not leave him till the trial is ended. He must lift this burden or he fails in the action. *Detroit & M. R. Co.* v. *Van Steinburg*, 17 Mich. 99; *Guggenheim* v. *L. S. & M. S. R. Co.*, 66 Mich. 150. The case was tried upon that theory and the opinion in all other portions proceeds upon that theory. V. H. L.